Evidence—Proving One's Case

Kyle Kaiser, Assistant Utah Attorney General

Utah Attorney General Fall CLE Conference

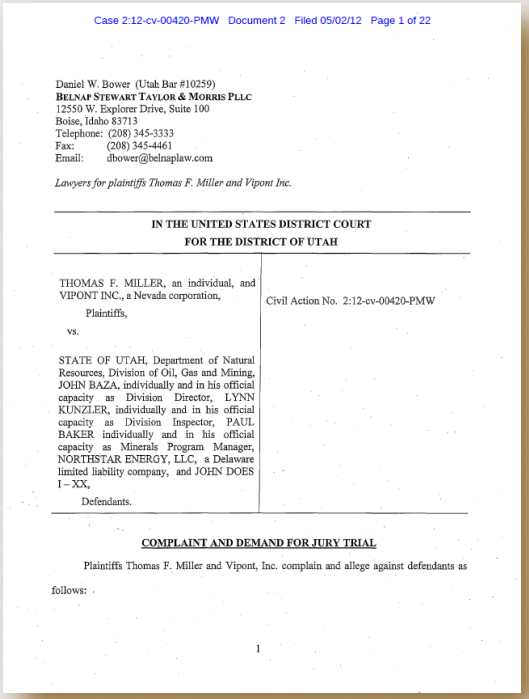
November 6, 2013

Evidence—Proving One's Case

- How Do We Decide What Evidence to Use and How to Use It? *An Overview Evidencing About Evidence.*
- Form and Manner of Evidence in Pretrial Dispositive Motions. *Proving One's Case on Paper.*
- Using Hearsay Evidence to Prove One's Case. *A Refresher on Rules 801-801.*

How Do We Decide What Evidence to Use and How to Use It?

Proving One's Case



Case 2:12-cv-00420-PMW Document 2 Filed 05/02/12 Page 1 of 22

Daniel W. Bower (Utah Bar #10259)
BELNAP STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax: (208) 345-4461
Email: dbower@belnaplaw.com

Lawyers for plaintiffs Thomas F. Miller and Vipont Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THOMAS F. MILLER, an individual, and VIPONT INC., a Nevada corporation,

Plaintiffs,

vs.

STATE OF UTAH, Department of Natural Resources, Division of Oil, Gas and Mining, JOHN BAZA, individually and in his official capacity as Division Director, LYNN KUNZLER, individually and in his official capacity as Division Inspector, PAUL BAKER individually and in his official capacity as Minerals Program Manager, NORTHSTAR ENERGY, LLC, a Delaware limited liability company, and JOHN DOES I – XX,

Defendants.

Civil Action No. 2:12-cv-00420-PMW

COMPLAINT AND DEMAND FOR JURY TRIAL

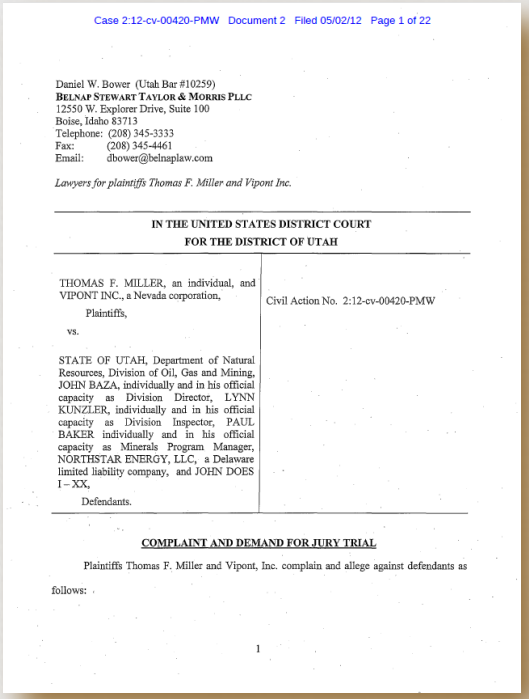
Plaintiffs Thomas F. Miller and Vipont, Inc. complain and allege against defendants as follows:

1

What do we do?

- *A Scheduling Order-Based Strategy*
- Answer
- Interview
- Discovery
- Experts
- MSJ
- Settle or Trial
- Appeal

Proving One's Case



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COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Thomas F. Miller and Vipont, Inc. complain and allege against defendants as follows:

1

What should we do?

- *A Elements-Based Strategy*
- Research
- Investigate
- Plan
- Evaluate
- Synthesize
- Persuade

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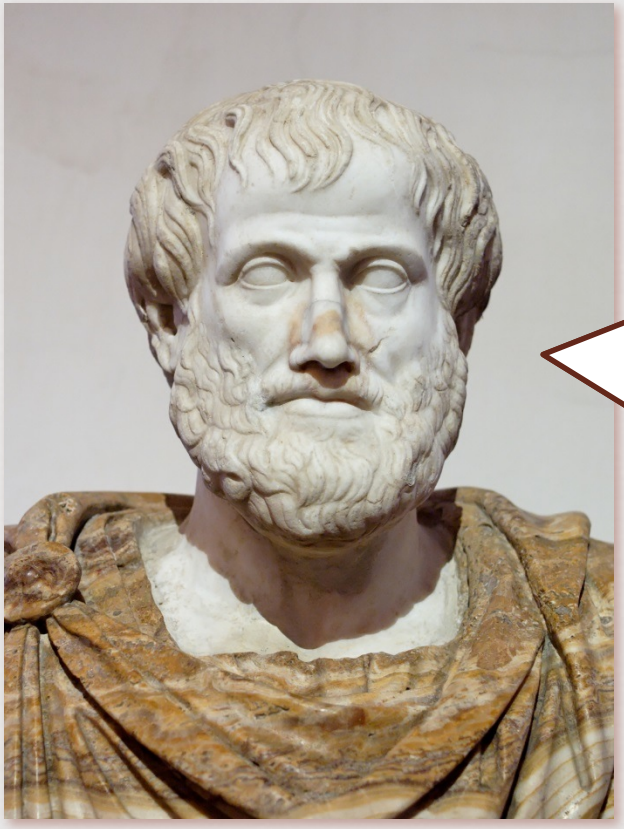
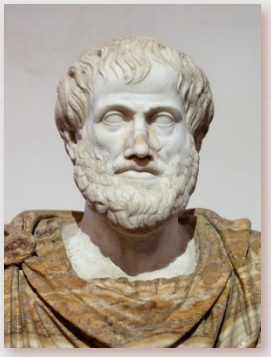


ethos
pathos
logos

Proving One's Case



ethos

An appeal to the authority or credibility of the presenter

pathos

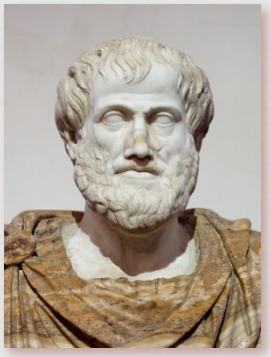
An appeal to the audience's emotions

logos

Logical appeal "or the simulation of it"

Source: "Modes of Persuasion," http://en.wikipedia.org/Modes_of_persuasion (last visited November 4, 2013).

Proving One's Case



- The mode we think about the most
- How do we increase the logical force of our case?
  - Valid Precedent
  - Organization
  - Mastery of Facts
  - Avoiding Logical Fallacies

logos

strawman

Misrepresenting someone's argument to make it easier to attack.

By exaggerating, misrepresenting, or just completely fabricating someone's argument, it's much easier to present your own position as being reasonable, but this kind of dishonesty serves to undermine rational debate.

After Will said that we should put more money into health and education, Warren responded by saying that he was surprised that Will hates our country so much that he wants to leave it defenceless by cutting military spending.

false cause

Presuming that a real or perceived relationship between things means that one is the cause of the other.

Many people confuse correlation (things happening together or in sequence) for causation (that one thing actually causes the other to happen). Sometimes correlation is coincidental, or it may be attributable to a common cause.

Pointing to a fancy chart, Roger shows how temperatures have been rising over the past few centuries, whilst at the same time the numbers of pirates have been decreasing; thus pirates cool the world and global warming is a hoax.

appeal to emotion

Manipulating an emotional response in place of a valid or compelling argument.

Appeals to emotion include appeals to fear, envy, hatred, pity, guilt, and more. Though a valid, and reasoned, argument may sometimes have an emotional aspect, one must be careful that emotion doesn't obscure or replace reason.

Luke didn't want to eat his sheep's brains with chopped liver and brussels sprouts, but his father told him to think about the poor, starving children in a third world country who weren't fortunate enough to have any food at all.

the fallacy fallacy

Presuming a claim to be necessarily wrong because a fallacy has been committed.

It is entirely possibly to make a claim that is false yet argue with logical coherency for that claim, just as is possible to make a claim that is true and justify it with various fallacies and poor arguments.

Recognising that Armanda had committed a fallacy in arguing that we should eat healthy food because a nutritionist said it was popular, Alyse said we should therefore eat bacon double cheeseburgers every day.

slippery slope

Asserting that if we allow A to happen, then Z will consequently happen too, therefore A should not happen.

The problem with this reasoning is that it avoids engaging with the issue at hand, and instead shifts attention to baseless extreme hypotheticals. The merits of the original argument are then tainted by unsubstantiated conjecture.

Colin Closet asserts that if we allow same-sex couples to marry, then the next thing we know we'll be allowing people to marry their parents, their cars and even monkeys.

ad hominem

Attacking your opponent's character or personal traits in an attempt to undermine their argument.

Ad hominem attacks can take the form of overtly attacking somebody, or casting doubt on their character. The result of an ad hom attack can be to undermine someone without actually engaging with the substance of their argument.

After Sally presents an eloquent and compelling case for a more equitable taxation system, Sam asks the audience whether we should believe anything from a woman who isn't married, was once arrested, and smells a bit weird.

tu quoque

Avoiding having to engage with criticism by turning it back on the accuser - answering criticism with criticism.

Literally translating as 'you too' this fallacy is commonly employed as an effective red herring because it takes the heat off the accused having to defend themselves and shifts the focus back onto the accuser themselves.

Nicole identified that Hannah had committed a logical fallacy, but instead of addressing the substance of her claim, Hannah accused Nicole of committing a fallacy earlier on in the conversation.

personal incredulity

Saying that because one finds something difficult to understand, it's therefore not true.

Subjects such as biological evolution via the process of natural selection require a good amount of understanding before one is able to properly grasp them, this fallacy is usually used in place of that understanding.

Kirk drew a picture of a fish and a human and with effusive disdain asked Richard if he really thought we were stupid enough to believe that a fish somehow turned into a human through just, like, random things happening over time.

special pleading

Moving the goalposts or making up exceptions when a claim is shown to be false.

Humans are funny creatures and have a foolish aversion to being wrong. Rather than appreciate the benefits of being able to change one's mind through better understanding, many will invent ways to cling to old beliefs.

Edward Johns claimed to be psychic, but when his 'abilities' were tested under proper scientific conditions, they magically disappeared. Edward explained this saying that one had to have faith in his abilities for them to work.

loaded question

Asking a question that has an assumption built into it so that it can't be answered without appearing guilty.

Loaded question fallacies are particularly effective at derailing rational debates because of their inflammatory nature – the recipient of the loaded question is compelled to defend themselves and may appear flustered or on the back foot.

Grace and Helen were both romantically interested in Brad. One day, with Brad sitting within earshot, Grace asked in an inquisitive tone whether Helen was having any problems with a fungal infection.

burden of proof

Saying that the burden of proof lies not with the person making the claim, but with someone else to disprove.

The burden of proof lies with someone who is making a claim, and is not upon anyone else to disprove. The inability, or disinclination, to disprove a claim does not make it valid (however we must always go by the best available evidence).

Bertrand declares that a teapot is, at this very moment, in orbit around the Sun between the Earth and Mars, and that because no one can prove him wrong his claim is therefore a valid one.

ambiguity

Using double meanings or ambiguities of language to mislead or misrepresent the truth.

Politicians are often guilty of using ambiguity to mislead and will later point to how they were technically not outright lying if they come under scrutiny. It's a particularly tricky and premeditated fallacy to commit.

When the judge asked the defendant why he hadn't paid his parking fines, he said that he shouldn't have to pay them because the sign said 'Fine for parking here' and so he naturally presumed that it would be fine to park there.

the gambler's fallacy

Believing that 'runs' occur to statistically independent phenomena such as roulette wheel spins.

This commonly believed fallacy can be said to have helped create a city in the desert of Nevada USA. Though the overall odds of a 'big run' happening may be low, each spin of the wheel is itself entirely independent from the last.

Red had come up six times in a row on the roulette wheel, so Greg knew that it was close to certain that black would be next up. Suffering an economic form of natural selection with this thinking, he soon lost all of his savings.

bandwagon

Appealing to popularity or the fact that many people do something as an attempted form of validation.

The flaw in this argument is that the popularity of an idea has absolutely no bearing on its validity. If it did, then the Earth would have made itself flat for most of history to accommodate this popular belief.

Shamus pointed a drunken finger at Sean and asked him to explain how so many people could believe in leprechauns if they're only a silly old superstition. Sean, however, had had a few too many Guinness himself and fell off his chair.

appeal to authority

Saying that because an authority thinks something, it must therefore be true.

It's important to note that this fallacy should not be used to dismiss the claims of experts, or scientific consensus. Appeals to authority are not valid arguments, but nor is it reasonable to disregard the claims of experts who have a demonstrated depth of knowledge unless one has a similar level of understanding.

Not able to defend his position that evolution isn't true, Bob says that he knows a scientist who also questions evolution (and presumably isn't herself a primate).

composition /division

Assuming that what's true about one part of something has to be applied to all, or other, parts of it.

Often when something is true for the part it does also apply to the whole, but because this isn't always the case it can't be presumed to be true. We must show evidence for why a consistency will exist.

Daniel was a precocious child and had a liking for logic. He reasoned that atoms are invisible, and that he was made of atoms and therefore invisible too. Unfortunately, despite his thinky skills, he lost the game of hide and go seek.

no true scotsman

Making what could be called an appeal to purity as a way to dismiss relevant criticisms or flaws of an argument.

This fallacy is often employed as a measure of last resort when a point has been lost. Seeing that a criticism is valid, yet not wanting to admit it, new criteria are invoked to dissociate oneself or one's argument.

Angus declares that Scotsmen do not put sugar on their porridge, to which Lachlan points out that he is a Scotsman and puts sugar on his porridge. Furious, like a true Scot, Angus yells that no **true** Scotsman sugars his porridge.

genetic

Judging something good or bad on the basis of where it comes from, or from whom it comes.

To appeal to prejudices surrounding something's origin is another red herring fallacy. This fallacy has the same function as an ad hominem, but applies instead to perceptions surrounding something's source or context.

Accused on the 6 o'clock news of corruption and taking bribes, the senator said that we should all be very wary of the things we hear in the media, because we all know how very unreliable the media can be.

black-or-white

Where two alternative states are presented as the only possibilities, when in fact more possibilities exist.

Also known as the false dilemma, this insidious tactic has the appearance of forming a logical argument, but under closer scrutiny it becomes evident that there are more possibilities than the either/or choice that is presented.

Whilst rallying support for his plan to fundamentally undermine citizens' rights, the Supreme Leader told the people they were either on his side, or on the side of the enemy.

begging the question

A circular argument in which the conclusion is included in the premise.

This logically incoherent argument often arises in situations where people have an assumption that is very ingrained, and therefore taken in their minds as a given. Circular reasoning is bad mostly because it's not very good.

The word of Zorbo the Great is flawless and perfect. We know this because it says so in The Great and Infallible Book of Zorbo's Best and Most Truest Things that are Definitely True and Should Not Ever Be Questioned.

appeal to nature

Making the argument that because something is 'natural' it is therefore valid, justified, inevitable, good, or ideal.

Many 'natural' things are also considered 'good', and this can bias our thinking, but naturalness itself doesn't make something good or bad. For instance murder could be seen as very natural, but that doesn't mean it's justifiable.

The medicine man rolled into town on his bandwagon offering various natural remedies, such as very special plain water. He said that it was only natural that people should be wary of 'artificial' medicines like antibiotics.

anecdotal

Using personal experience or an isolated example instead of a valid argument, especially to dismiss statistics.

It's often much easier for people to believe someone's testimony as opposed to understanding variation across a continuum. Scientific and statistical measures are almost always more accurate than individual perceptions and experiences.

Jason said that that was all cool and everything, but his grandfather smoked, like, 30 cigarettes a day and lived until 97 - so don't believe everything you read about meta analyses of sound studies showing proven causal relationships.

the texas sharpshooter

Cherry-picking data clusters to suit an argument, or finding a pattern to fit a presumption.

This 'false cause' fallacy is coined after a marksman shooting at barns and then painting a bullseye target around the spot where the most bullet holes appear. Clusters naturally appear by chance, and don't necessarily indicate causation.

The makers of Sugarette Candy Drinks point to research showing that of the five countries where Sugarette drinks sell the most units, three of them are in the top ten healthiest countries on Earth, therefore Sugarette drinks are healthy.

middle ground

Saying that a compromise, or middle point, between two extremes must be the truth.

Much of the time the truth does indeed lie between two extreme points, but this can bias our thinking: sometimes a thing is simply untrue and a compromise of it is also untrue. Half way between truth and a lie, is still a lie.

Holly said that vaccinations caused autism in children, but her scientifically well-read friend Caleb said that this claim had been debunked and proven false. Their friend Alice offered a compromise that vaccinations cause some autism.

thou shalt not commit logical fallacies

A logical fallacy is a flaw in reasoning. Strong arguments are void of logical fallacies, whilst arguments that are weak tend to use logical fallacies to appear stronger than they are. They're like tricks or illusions of thought, and they're often very sneakily used by politicians, the media, and others to fool people. Don't be fooled! This poster has been designed to help you identify and call out dodgy logic wherever it may raise its ugly, incoherent head. If you see someone committing a logical fallacy online, link them to the relevant fallacy to school them in thinkiness e.g. yourlogicalfallacyis.com/strawman

yourlogicalfallacyis.com

https://yourlogicalfallacyis.com/assets/fallaciesPosterHigherRes.jpg

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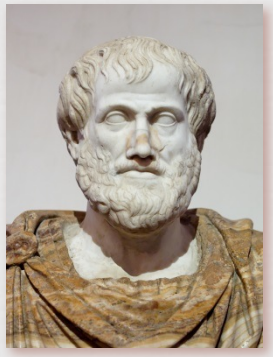

pathos

- "awakening emotion in the audience so as to induce them to make the judgment desired"
- We think about this a lot for trials, but should we think about it before?

The Who, the Why and th

herculesandtheumpire.com/the-who-and-why-of-this-blog/

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HERCULES AND THE UMPIRE.

THE ROLE OF THE FEDERAL TRIAL JUDGE

HOME CONTACT ME COPYRIGHT AND STUFF THE WHO, THE WHY AND THE TITLE OF THIS BLOG

Moreover, because I serve at the trial level, I am also supposed to be an applicator of a complex series of rules that one hopes in the very long run will produce some sort of "justice." There is no reasonable expectation that "justice" writ large can be served on a daily basis. In fact, it is rarely my proper role to be a judicial policy maker. That's for the big boys and girls. **As I once told a federal public defender, "I don't do justice, I do law." Most of the time, I wouldn't know "justice" in the metaphysical sense if it bit me in the ass.**

locates the proper role of a federal trial judge.

Sentence an aging crack whore, have her hang herself in the cell adjacent to your courtroom right after you have done so, and then ask yourself how much empathy you feel for the rat bastard who knowingly feed her addiction. Do I have empathy for the self-proclaimed"gentle"drug dealer I sentenced to life in prison, who directed his crew to sodomize a teenage girl with motor oil 'cause she didn't pay her drug debt, and who beat others with baseball bats or pipe wrenches when the unfortunates threatened to snitch or failed to pay their bills? No, I don't.

April 2013

March 2013

February 2013

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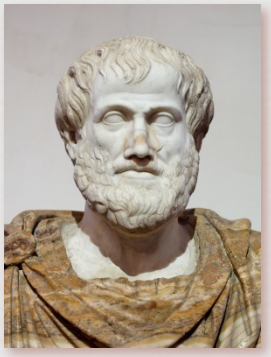


pathos

- How can we increase the emotional effect of our arguments?
  - Theory & Theme
  - Tight writing
  - (Appropriate) Humor and rhetorical devices
  - Give the Court a reason to believe that it's doing the right thing

Proving One's Case—Theme & Theory

"Plaintiff Fernando Nunez brings multiple causes of action against Officer Shane Burton, formerly of the special operations unit of the Motor Vehicle Enforcement Division of the Utah State Tax Commission. Burton investigated a BMW reported stolen by Defendant Basem Hamdan that was in the possession of Nunez. **Burton had no knowledge of any prior relationship between Hamdan and Officer Steven Bernards of the South Salt Lake police, proceeded professionally and in accordance with policy, and simply did his job and returned a reported stolen vehicle.** There is no evidence of a conspiracy, his removal of the BMW was for law enforcement purposes, and he had neither malice nor an absence of probable cause to support a constitutional claim for malicious prosecution. Thus, he is entitled to summary judgment on all claims in the Amended Complaint under which he is named."

Motion for Summary Judgment, *Nunez v. Hamdan, et al.*

Proving One's Case—Empathy

"**Brian Maguire's stroke was unfortunate**. His aversion to the difficult symptoms of methadone withdrawal are understandable. The confluence of circumstances (including his previously undiagnosed blood clotting disorder) led to a negative outcome. **But that does not mean that any of the Prison Officials were deliberately indifferent to Maguire's serious medical needs**. The medical staff followed prison policy and supervised Maguire's methadone withdrawal. They attended to his symptoms. When medical attention was required, he was seen. And when he presented with serious sign of a stroke, he was provided comprehensive emergency care, which led to the discovery of Maguire's blood disorder. Though the medical staff may have formulated a mistaken diagnosis, they were not deliberately indifferent. Non-medical staff likewise followed medical instruction and did not ignore obvious medical issues. For these reasons, and for the reasons articulated in the Prison Officials' original Memorandum, they are thus entitled to summary judgment on Maguire's Amended Complaint."

Reply Memo. in Support of Summary Judgment, *Maguire v. Garden.*

Proving One's Case—Humor

"Plaintiffs did not have a permit, nor did they have a legitimate claim to it, under state law. Plaintiffs' pre-emptive, pre-protected procedural process postulate plunks."

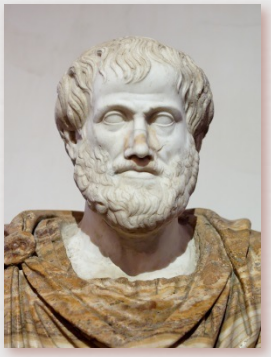
Motion for Summary Judgment, *iMatter v. Njord*

Proving One's Case—Humor

"Plaintiffs drill deep to attempt to uncover a load [lode?] of creative legal theories to recover damages from the lawful reclamation of the Vipont Mine. But there are no diamonds in the rough. The State Defendants gave Mr. Miller decades of time to comply with the law, but he repeatedly refused. When communication with Mr. Miller stopped, and NorthStar's predecessors appeared to take over mining operations, the State Defendants worked with them, under the then-existing law, to establish a plan to reclaim the mine. After decades of inactivity, and when NorthStar's predecessors entered bankruptcy, they helped coordinate the reclamation and ensured that the law was complied with. None of these activities adversely affected Plaintiffs' constitutional, statutory, or common law rights."

Motion for Summary Judgment, *Miller v. State of Utah*

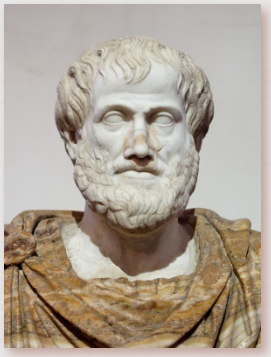
Proving One's Case



ethos

- "an appeal to the authority or credibility of the presenter"
  - *Phronesis*—practical skills & wisdom
  - *Arete*—virtue, goodness
  - *Eunoia*—goodwill towards the audience
  - Competence & Character
- Ethos belongs to the audience, not the speaker.

Proving One's Case



ethos

- What can we do to increase the perception of high competence and character?
  - Knowledge of the facts
  - Candor to the tribunal
  - Well-cited, and properly formatted, briefs

Proving One's Case–Citations

- *The Bluebook – It's on its 19th Edition!!*
  - 17th ed. (2000) (391 pp.)
    - No parenthetical required after every signal
  - 18th ed. (2005) (415 pp.)
    - Added *Bluepages*, many other small changes
  - 19th ed. (2010) (511 pp.)*
    - ECF citations in Bluepages
    - Makes changes for parenthetical order
    - Expands citation forms for electronic resources
    - Modifies citations to administrative agency materials
- *ALWD Citation Manual* – 4th ed. (704 pages!)

* Bluebook, 1st ed. (1928) – 28 pp.

- "State of" unnecessary (BB10.2.1.(f))
- Space between "F." and "Supp." and "2d" and but not between "D." and "N.M." (BB6.1)
- "cert denied" subsequent history unnecessary (BB10.7)
- "last visited" unnecessary here(B10.1.1)
- "et al." is unnecessary (BB10.2.1(a))
- "Colorado" should be abbreviated "Colo." and "County" "Cnty." (BBT6)
- Unpublished opinion needs case number and day-date, as well as indication that case hasn't been selected for an official reporter (BB18.3.1)

at 10, ECF No. 35; *See also* U.S. Const. amend. VIII. But because the Defendant Medical Staff exercised their medical discretion in prescribing methadone, there can be no deliberate indifference.

Jones v. New Mexico, 275 F. Supp. 2d 134, 139 (D.N.M. 2004), *aff'd* 450 F.3d 996 (10th Cir. 2005); *see Methadone Information from Drugs.com*, Drugs.com (Jan. 27, 2012 5:27 PM), http://www.drugs.com/methadone.html (defining the uses of methadone); *Marcus v. Colo. Cnty.*, No. 12-654, 2012 WL 4566136, at *2 (10th Cir. May 31, 2012).

- "Judg." abbreviated "J." (BT1)
- "*see also*" should not be capitalized (BB 1.3)

Proving One's Case–Citations

- Additional T.6 Abbreviations (18th & 19th eds.)
  - Alternative — Alt.
  - County — Cnty.
  - Employee — Emp.
  - Employer — Emp'r
  - Employment — Emp't
  - Gender — Gend.
  - Group — Grp.
  - Ne., Nw., Se., Sw.
  - Number — No.
  - Opinion — Op.
  - Township — Twp.

Proving One's Case–Citations

- *But see* Richard R. Posner, *The Bluebook Blues*, 120 Yale L.J. 850, 853:

I have put my money where my mouth is, metaphorically speaking. I don't use The Bluebook or any other form book in either my judicial opinions or my academic writings. Journals, and not only law journals, do sometimes impose citation forms on me. But the Federal Reporter does not; nor do the publishers of most of my books. My judicial and academic writings receive their share of criticism, but no one to my knowledge has criticized them for citation form. The reason is that readers are not interested in citation form. Unless the form is outlandish, it is invisible.

Proving One's Case–Hyperlinking

- **DUCivR 7–5 (Proposed Sept. 2013)**

(a) Encouraged and Impermissible Hyperlinks.

As a convenience for the court, **practitioners are encouraged to utilize hyperlinks in a manner consistent with this rule**. For purposes of this rule, a hyperlink is a reference within an electronically filed document that permits a user to click on the reference so as to be directed to other content. Standard legal citations must still be used so that those who desire to retrieve referenced material may do so without use of an electronic service.

(1) Encouraged Hyperlinks.

(A) Hyperlinks to other portions of the same document and to material elsewhere in the record, such as exhibits or deposition testimony, **are encouraged**.

(B) A hyperlink to a government site or to legal authority from recognized electronic research services, such as Westlaw, Lexis/Nexis , Google Scholar, Casemaker, Fastcase or Findlaw, is permissible.

(2) Impermissible Hyperlinks.

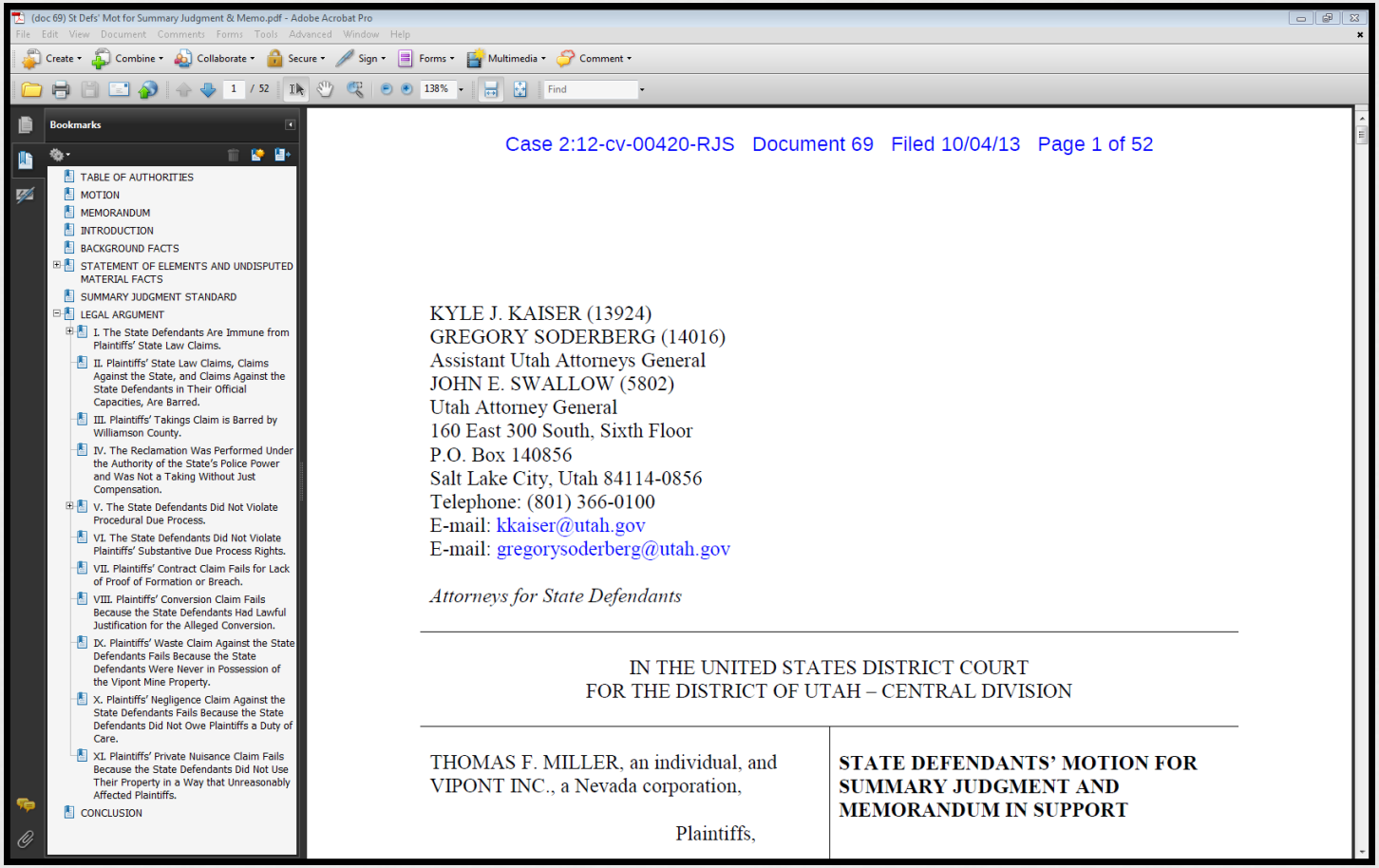
A hyperlink to any other internet resource not identified in subsection (a)(1) is impermissible without leave of court and the content of such an internet resource shall not be part of the record. **If a litigant wishes to include in the record material from such a resource, it must be mad e part of the record in some other fashion,** such as filing the material as an exhibit or by filing a Notice of Conventional Filing pursuant to Section II(E)(7) of the District of Utah CM/ECF Administrative Procedures Manual and filing a copy of the material on a electronic media in PDF format.

http://www.utd.uscourts.gov/documents/2013_proposed_rules_packet.pdf

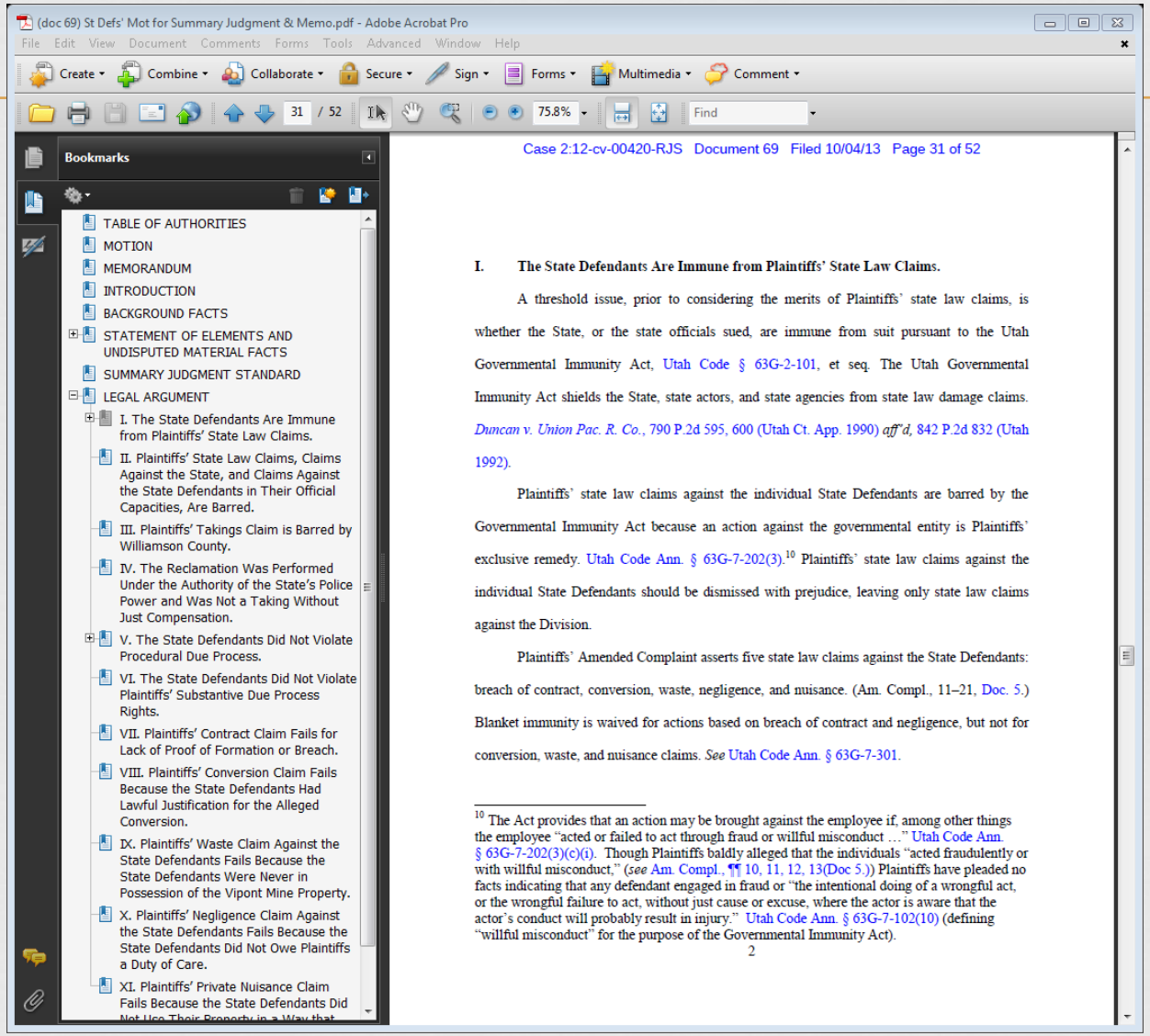
Proving One's Case–Hyperlinking

- Hyperlinks to cases: WestInsertLinks, West BriefTools
- Hyperlinks to ECF Documents: LinkBuilder
- Hyperlinks within documents: Word TOC, Adobe PDF
- Resources: federalcourthyperlinking.org, Judge Nuffer's "Suggestions for Creating a Really Accessible Document, http://www.utd.uscourts.gov/judges/Creating_A_Really_Accessible_Document.pdf
- It really does add to your credibility!

Proving One's Case–Hyperlinking



Proving One's Case–Hyperlinking



Proving One's Case–Hyperlinking

- What does this have to do with Proving One's Case?
  - Evidence you have to marshal
  - Form it will take
  - Plan, Preparation, Perfection!

Interlude No. 1

Interlude No. 1

Interlude No. 1

Form and Manner of Evidence in Pretrial Dispositive Motions.

Form of Evidence in Motions

- How does one prove one's case in dispositive motions?
  - Proper Form
  - Elements
  - Theme & Theory

Form of Evidence in Motions – Proper Form

- I am preparing a motion for summary judgment. I have deposition transcripts, declarations, exhibits, photos, videos… how do I present them?

Form of Evidence in Motions – Proper Form

Fed. R. Civ. P. 56(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Form of Evidence in Motions – Proper Form

DUCivR 56-1(f)

- All evidence offered in support of or opposition to motions for summary judgment must be submitted in a separately filed appendix with a cover page index. The index must list each exhibit by number, include a description or title and, if the exhibit is a document, provide the source of the document. A responding party may object as provided in Fed. R. Civ. P. 56(c)(2). Upon the failure of any responding party to object, the court may assume for purposes of summary judgment only that the evidence proffered would be admissible at trial.

Form of Evidence in Motions – Proper Form

- What does this mean?
  - Evidence need not be in a form admissible at trial to support your motion.
    - (After all, affidavits, documents, and deposition transcripts are likely hearsay!)
  - According to DUCivR56-1(f), you don't need to authenticate documents (unless you think the opposing party will challenge them)
  - The separate Motion to Strike (should be) dead. *See* 2010 Advisory Committee Notes.
  - The party opposing summary judgment has the burden to challenge your evidence.
  - You have the burden, once challenged, to prove that it could be presented in an admissible form. *See* 2010 Advisory Committee Notes.

Form of Evidence in Motions – Proper Form

- How do you challenge someone's evidence?
  - By objecting to the evidence, either in your motion, or in a separate document!
    - DUCivR 56-1(b)(1)(B)
    - For motions for which evidence is offered in support, the response memorandum may include evidentiary objections. … [I]n exceptional cases, a party may file evidentiary objections as a separate document. A party offering evidence to which there has been an objection may file a response to the objection at the same time any responsive memorandum, if allowed, is due, or no later than seven (7) days after the objection is filed, whichever is longer. **Motions to strike evidence as inadmissible are no longer appropriate and should not be filed**. The proper procedure is to make an objection. See Fed. R. Civ. P. 56(c)(2).

Form of Evidence in Motions – Proper Form

73. Defendants object, as the basis of this fact is an impermissible lay opinion and is not relevant. Fed. R. Evid. 401, 402, 602.

18. Defendants object to the facts in Paragraph 18 as Plaintiff Mateus lacks personal knowledge of the facts or any specialized education, training, and experience for the opinions. Fed. R. Evid. 602, 701, 702. Mateus Dep. at 16:14 – 17:8. Defendants admit that Plaintiffs would have preferred to march in the street, but dispute that the march "needed to be in the

3.1. Defendants object to this fact, as it is based on hearsay or lack of personal knowledge. Maguire does not have the expertise to identify Methadone "or a like liquid narcotic from diabetic pill-line." Fed. R. Civ. P. 56(c)(2); Fed. R. Evid. 802; 701.

Form of Evidence in Motions – Proper Form

Do we get to do all this cool stuff in state court, too?

Form of Evidence in Motions – Proper Form

- Utah R. Civ. P. 56(e). Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

- Utah R. Civ. P. 7(c)(3)(D)

A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

- "Utah case law has uniformly required that a party who sees deficiencies in a Rule 56 affidavit move to strike the affidavit or object to it in some equivalent way; otherwise, any objection is waived and the averments of the affidavit are properly before the Court." *Lister v. Utah Valley Comm. Coll.*, 881 P.2d 933, 942 (Orme, J., dissenting).

Form of Evidence in Motions – Proper Form

- While the heart of the rules appear to be the same, the structure and case law certainly are different.
- Experience with affidavits? Authentication of discovery materials?

Form of Evidence in Motions—Elements

- **DUCivR 56(b): A new take on the summary judgment practice**
- Introduction section
- Optional Background section (which does not require citation)
- A section entitled "Statement of Elements and Undisputed Material Facts" that
- contains the following:
  - (A) Each legal element required to prevail on the motion;
  - (B) Citation to legal authority supporting each stated element (without argument);
  - (C) Under each element, a concise statement of the material facts necessary to meet that element as to which the moving party contends no genuine issue exists.
- An argument section
- Oppositions must include an opposition to the *elements* as well as the facts.
- Oppositions may include statement of additional elements and material facts

Form of Evidence in Motions—Elements

- **DUCivR 56-1 (b): A new take on the summary judgment practice**
  - Fine when you're talking about standard claims with regular elements.
  - What about affirmative defenses? Burden-shifting? "Totality of the circumstances" claims? Claims where the elements are not well-defined by statute?
  - **MANDATORY.** *See Tiscareno v. Frasier*, No. 2:07-cv-336 (October 2013) (CW imposes sanctions on defendants for failure to follow the rule)
    - Court asks Plaintiff to estimate amount of extra time that it took her to respond to Defs.' Motion.
    - 22-31 hours (out of 213.1)
    - Does this system *really* save anyone time?

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

I. Plaintiffs' First Cause of Action: State and Federal Procedural Due Process.[8]

a. Regarding Federal Procedural Due Process via Section 1983, Plaintiff must sue individuals acting under color of law, in their individual capacity. 42 U.S.C. § 1983. State governments are not 'persons' for purposes of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

1. Plaintiffs sue the "Personal Defendants," the Division, The State of Utah, and the Division of Natural Resources for due process violations. (Am. Compl., p. 11, Doc. 5.)

a. Plaintiffs possessed a constitutionally protected liberty or property interest. *Zwygart v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Kan.*, 483 F.3d 1086, 1093 (10th Cir. 2007).

1. The State Defendants do not contest, for the purposes of this summary judgment motion, that Plaintiffs possessed a constitutionally protected property interest in the personal property destroyed during reclamation, and a property interest in the real property (75% cotenancy) subject to reclamation.

b. Plaintiffs were afforded an appropriate level of process. *Zwygart*, 483 F.3d at 1093; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). (three factors considered: the private interest affected, the risk of erroneous deprivation, and value of any additional or substitute procedural safeguards)

1. Plaintiffs' co-tenant NorthStar received notice of the reclamation, and actually performed the reclamation through a third-party contractor. (*See* Stipulation and Order, KUNZLER000318–25, App. 55; Proposal to Aurora from the Xcavation Company, NS02033.)

2. At the time of the reclamation, the State Defendants had been communicating with NorthStar, or their predecessor in interest, regarding

[8] " 'Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution. Therefore, our analysis of questions concerning procedural due process under [both state and federal] constitutions are also substantially the same.' " *State v. Angilau*, 2011 UT 3, ¶ 13, 245 P.3d 745 (quoting *Bailey v. Bayles*, 2002 UT 58, ¶ 11 n. 2, 52 P.3d 1158).

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS[2]

I. First Cause of Action in the Amended Complaint—§ 1983 Malicious Prosecution

a. **Plaintiff's liberty was significantly restricted**. *Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007).

1. Nunez was not arrested by Officer Burton. (Burton Dep. 25:24–26:4; 63:6–10; Nunez Dep. 88:14–89:9; 90:20–24.)

2. Nunez was later charged, but never incarcerated, on charges of theft. (Burton Dep. Ex. 24, 25; Am. Compl. ¶¶ 41–45.)

3. Nunez learned of the charge though his lawyers; he was never arrested. (Nunez Dep. 105: 2–13.)

[2] All claims against Officer Burton are brought pursuant to 42 U.S.C. § 1983. That statute provides a civil remedy against "every person who, under color of [law], subjects, or causes to be subject, and citizen of the United States or any other person within the jurisdiction thereof of the depriviation of any rights, privileges, or immunities secured by the Constitution and laws …." 42 U.S.C. § 1983. Officer Burton does not contest that, for all Nunez's claims, he was acting under color of law. Thus, the elements listed in the Statement of Elements are related to the substantive constitutional violations and the issue of qualified immunity.

Above: Summary Judgment Motion, *Nunez v. Hamdan*

Left: Summary Judgment Motion, *Miller v. NorthStar*

Form of Evidence in Motions—Elements

- **Is it here to stay?**
  - **Hard to say.**
  - Unique to D. Utah.
  - Committee takes comments
  - Little skin off Court's nose; can be a lot of skin off of litigants'.

Interlude No. 2

Using Hearsay to Prove One's Case

Hearsay

- What is hearsay and why do we care?
- Definitions, Exemptions (Exclusions), Exceptions
- Hearsay, the Confrontation Clause, and *Crawford* and Its Progeny

Hearsay—What? Why Do We Care?

- What is Hearsay?
  - A statement that:
    - The declarant does not make while testifying at the current trial or hearing; and
    - A party offers in evidence to prove the truth of the matter asserted.

Selected slides and graphics taken from the lecture notes of David Achtenberg, UMKC School of Law, http://law.umkc.ed/faculty-staff/people/achtenberg-david.asp

Hearsay—What? Why Do We Care?

- Why do we care?
- (Not a hypothetical question!)

Hearsay—What? Why Do We Care?

- The four "hearsay risks" Wright, Graham, Gold, & Graham, 30 *Federal Practice & Procedure* Evidence § 6324
  - Defects in perception– the trier of fact cannot tell of the declarant had an inadequate opportunity to observe, had defects in her abilities to perceive, or might have misunderstood because of bias
  - Defective memory of the declarant, either in the "recordation or the recollection"
  - Defective narration – the declarant may have misspoken, or the witness may have misheard
  - Defective veracity or sincerity (Wright & Miller think that courts are overly concerned with this.)

Hearsay—What? Why Do We Care?

- Justifications for the hearsay rule:
  - Lack of cross-examination*
    - But, what if the declarant is available to testify? Generally, that doesn't vitiate hearsay.
    - Lack of "contemporaneous" cross-examination
  - Lack of oath
    - But, with some exceptions, prior statements, even under oath, are hearsay
    - And "swearing a witness" probably means less than it did 300 years ago. *Cf.* Wright, "Our purpose of the oath is to provide a stimulus to overcome these trivial motivations to falsehood, the very sort of psychological influences that do not rise to the level of the kind of bias or partisanship that can be elicited on cross-examination or proved by evidence external to the witness."
  - No "demeanor"
    - Trier of fact observing the demeanor of the declarant
    - Declarant observing the demeanor of the proceeding
    - Trier of fact may impute the demeanor of the witness onto the statement of the declarant

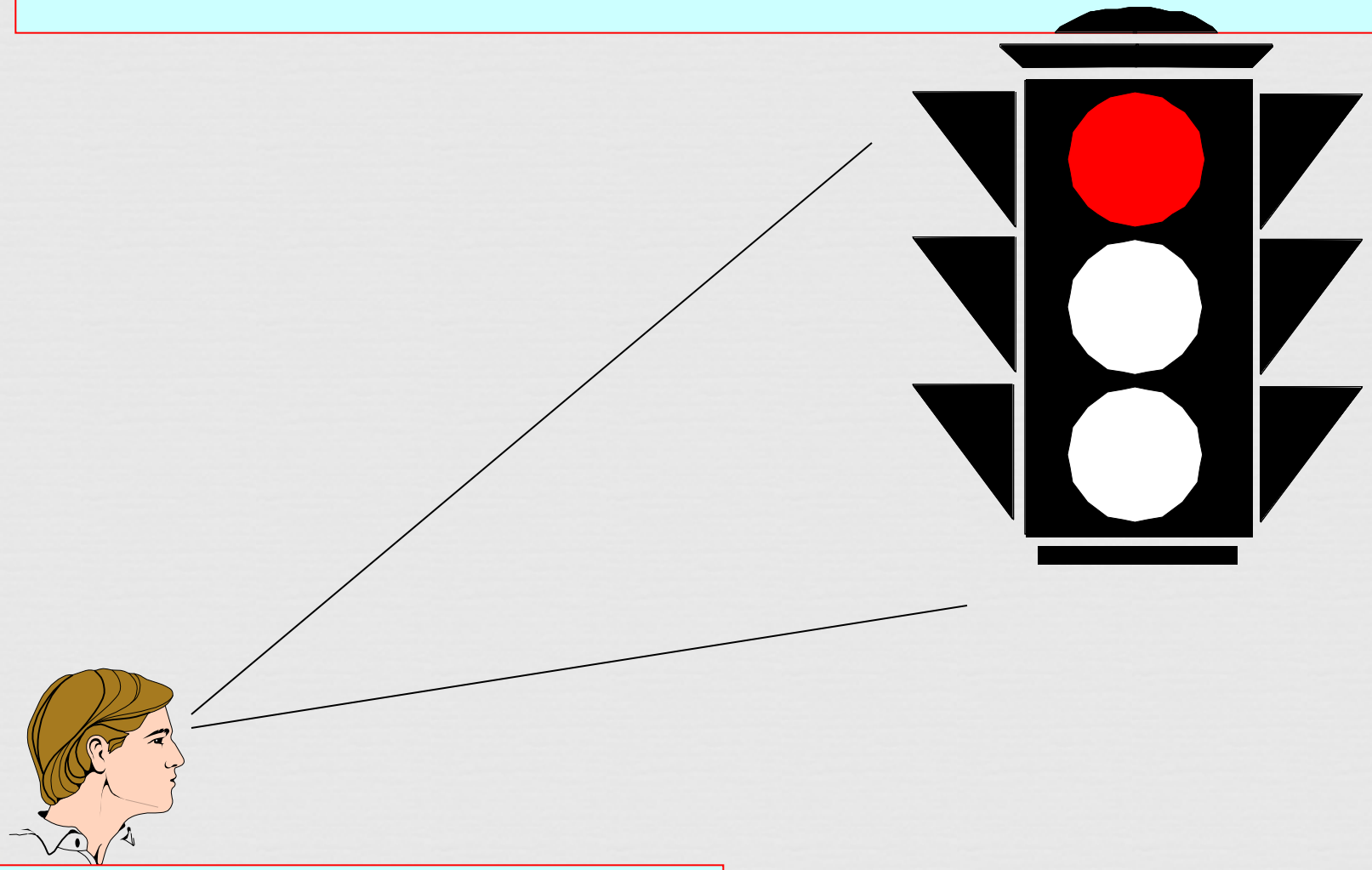
Hearsay—What? Why Do We Care?

- Justifications for the hearsay rule (ctd.)
  - Lack of personal knowledge
    - Was considered a major reason for the hearsay rule, before Prof. Whigmore's claim that cross-examination was the "only" reason for the rule.
  - Lack of probative value
    - Hearsay doubles the chance that testimonial evidence might be unreliable (lack of perception, lack of memory, lack of communication, lack of words to describe perception, and lack of sincerity)
    - How is this evidence any better than the newspaper, or what the neighbors have said?
  - Lack of trustworthiness
    - Either lying or "incorrect transmission"
    - There is an ease with which hearsay statements can be fabricated by a party to fill a gap in her case.
    - "If the circumstances that the eyewitness of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained." *Mima Queen v. Hepburn*, 7 Cranch (11 U.S.) 290, 296 (1813)

Hearsay—What? Why Do We Care?

- Justifications for hearsay exceptions:
  - The policy for cross-examination is unnecessary due to other guarantees of trustworthiness ("reliability")
  - The policy of cross-examination is outweighed by some other important policy reason ("necessity")
    - But if that's the case, then what about "convenience?"
- But question: Do our rules protect from our concerns? Do they separate "good" hearsay from "bad"? How, as advocates, can we think about the purposes of hearsay when arguing for the inclusion or exclusion of evidence?

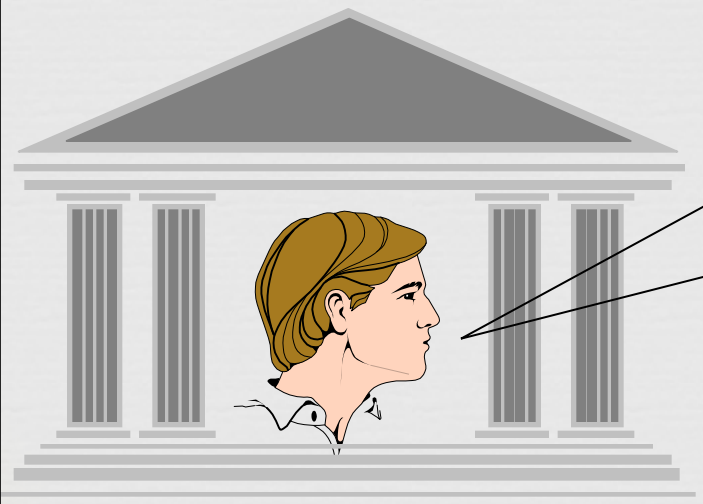
Start with a fact of consequence

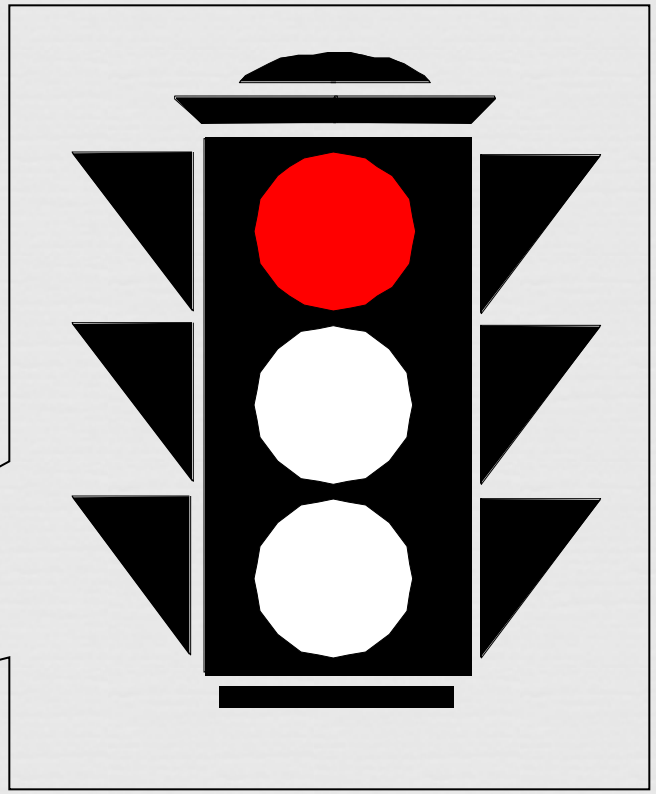


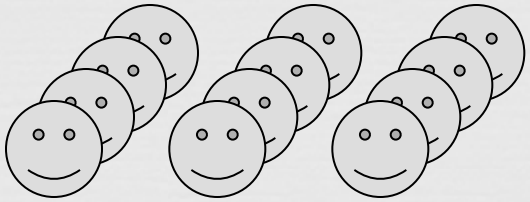
Add an observer

Bring the observer to court

No Hearsay Problem







Jury

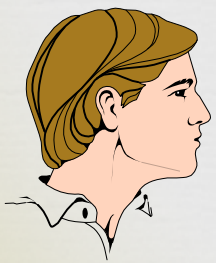
Have observer tell jury what he saw

Not hearsay. Jury only has to believe the witness -- no one else

If witness says something is true, the factfinder can conclude that it is true

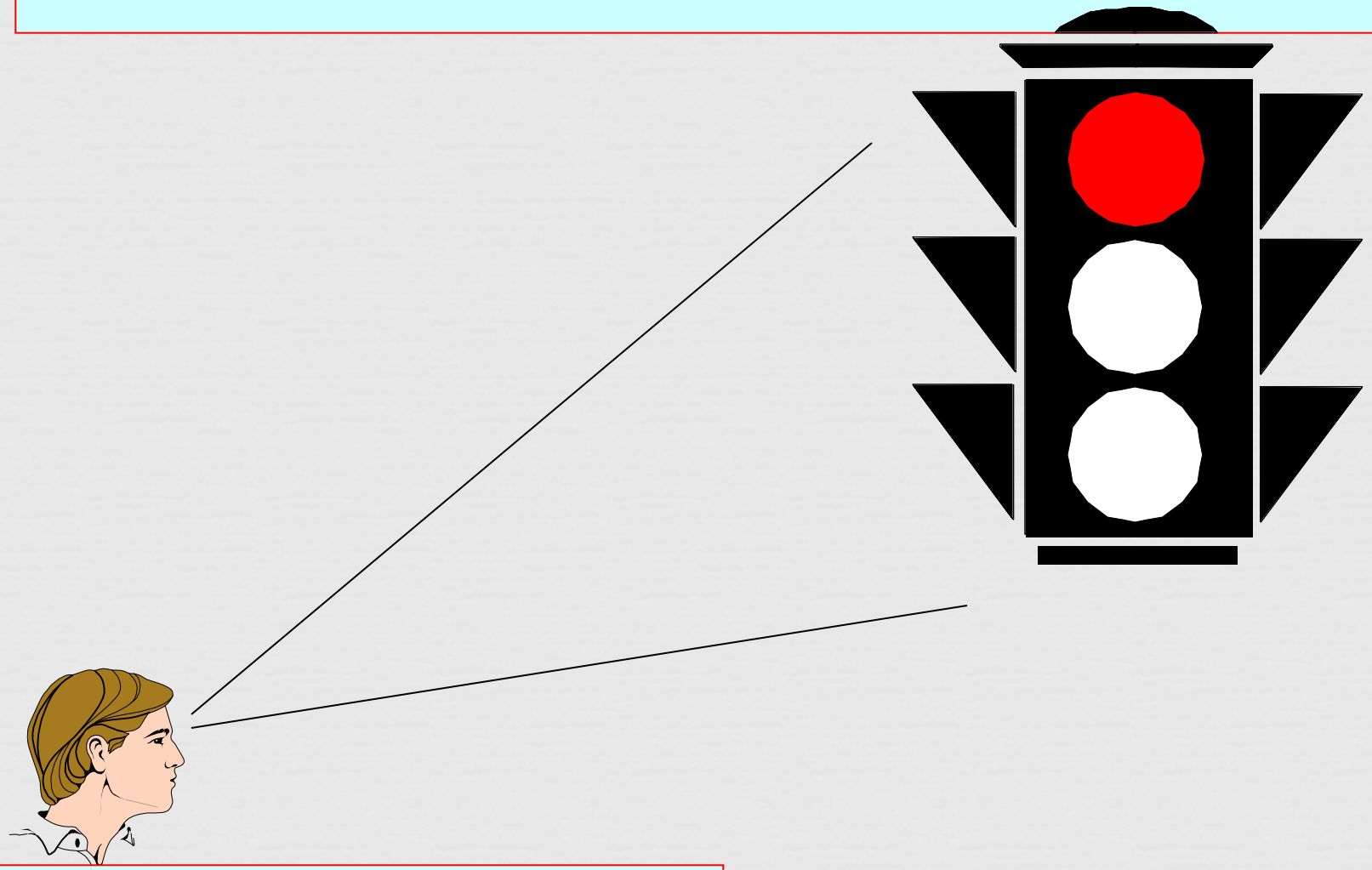
Light was red

Light was red



Witness = Observer

Start with a fact of consequence



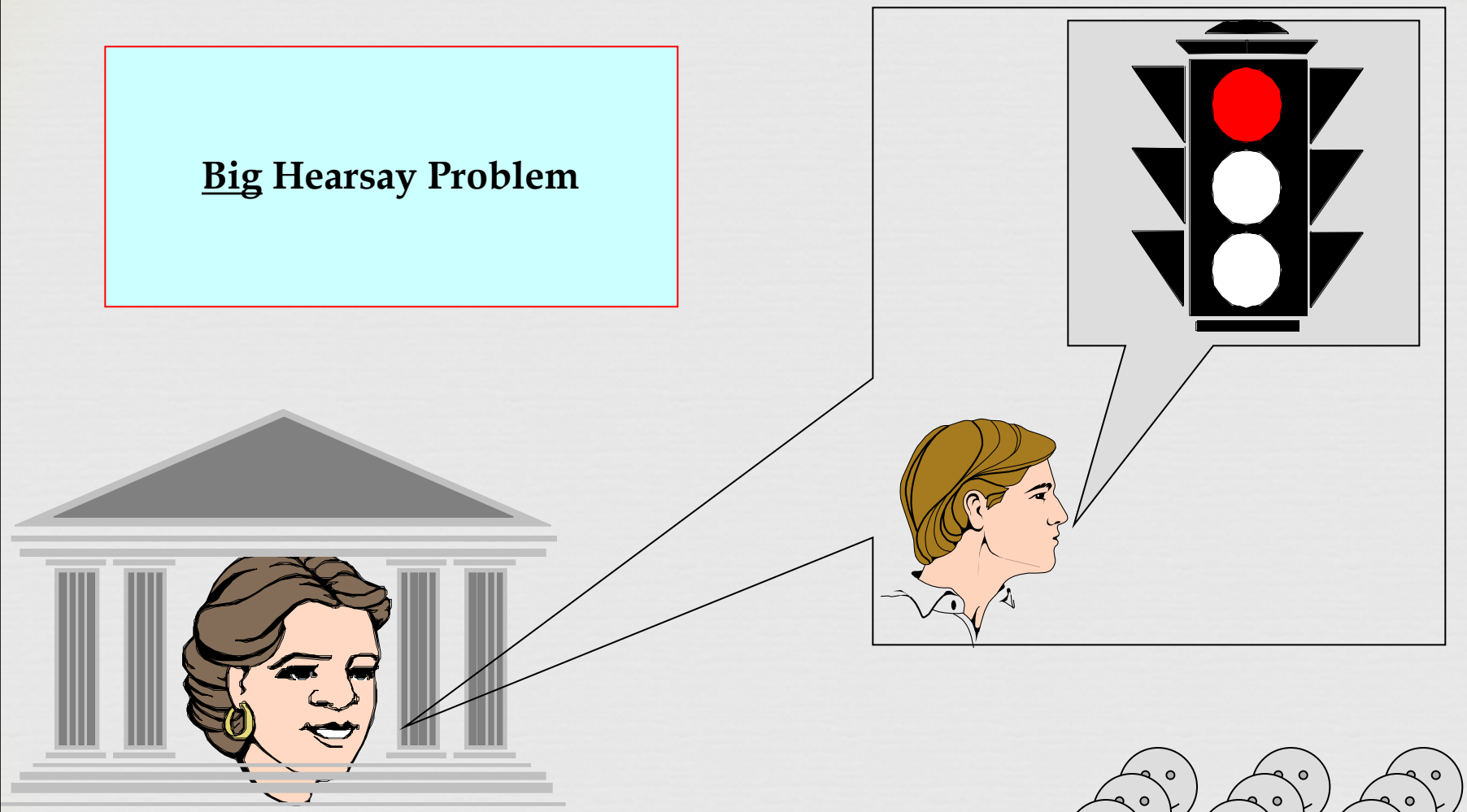
Add an observer

Take the observer to golf course

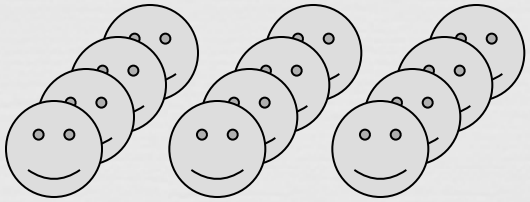
Have observer tell friend what he saw

Bring the friend to court

Big Hearsay Problem



Have friend tell jury what she knows



Jury

Hearsay. Jury has to believe an observer who is not testifying.

If observer (who is not the witness) says something is true, it is that person that the factfinder must believe

He told me light was red

Light was red

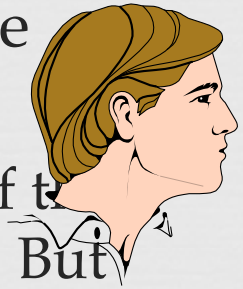
Witness is not the Observer

Hearsay—What? Why Do We Care?

- What is Hearsay?
  - A statement that:
    - The declarant does not make while testifying at the current trial or hearing; and
    - A party offers in evidence to prove the truth of the matter asserted.

Hearsay—What? Why Do We Care?

- What is Hearsay?
  - The "Declarant" is the person who made the statement outside of court
  - Note: a "declarant" may be the witness, if the witness is testifying to a prior statement. But the declarant is usually someone else
  - A "Statement" is any "oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion."
  - 801(b) & (a)



Hearsay—What? Why Do We Care?

- Two criminals rob a house. Silver is missing.
- Polly the parrot is at home.

- Polly's put on the stand in *People v. Johnny Smith.*

Hearsay—What? Why Do We Care?

- Hearsay?

- (Maybe a creative lawyer argues about hearsay-within-parrot….)

Hearsay—What? Why Do We Care?

- What about a computer-added header?

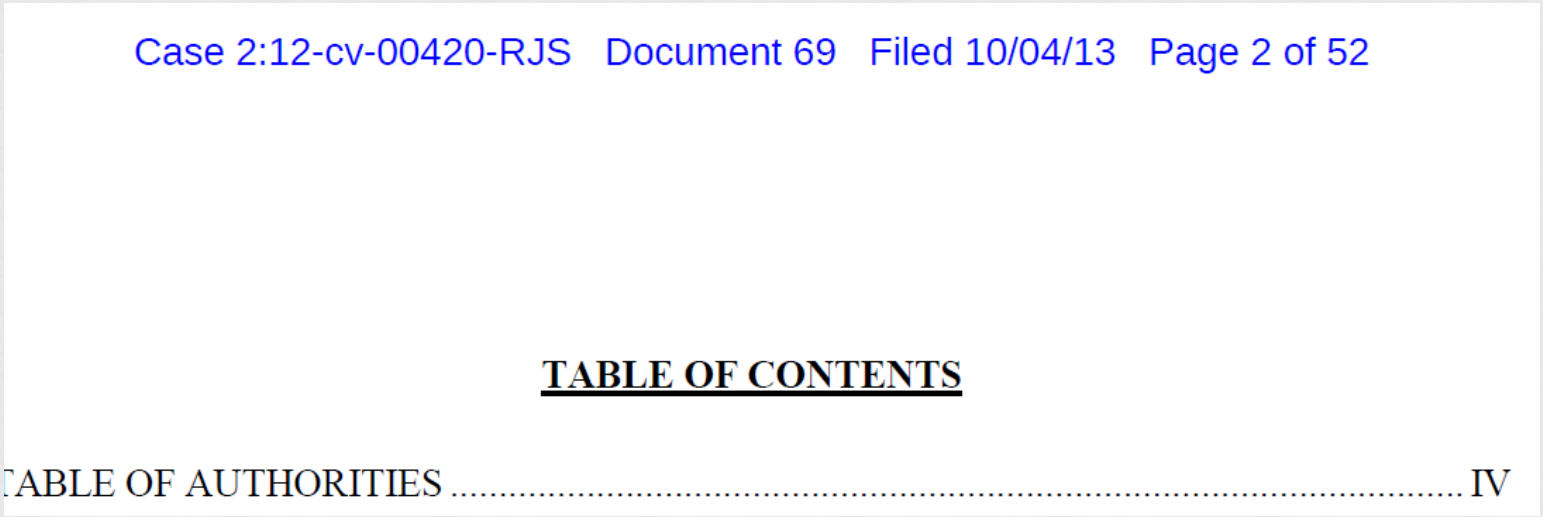


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TABLE OF AUTHORITIES IV

- No. *See United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005) (computer header created by computer newsgroup was not hearsay, because there was no "declarant" or "statement" and header's contents (username and IP address of poster) were admissible in criminal case)

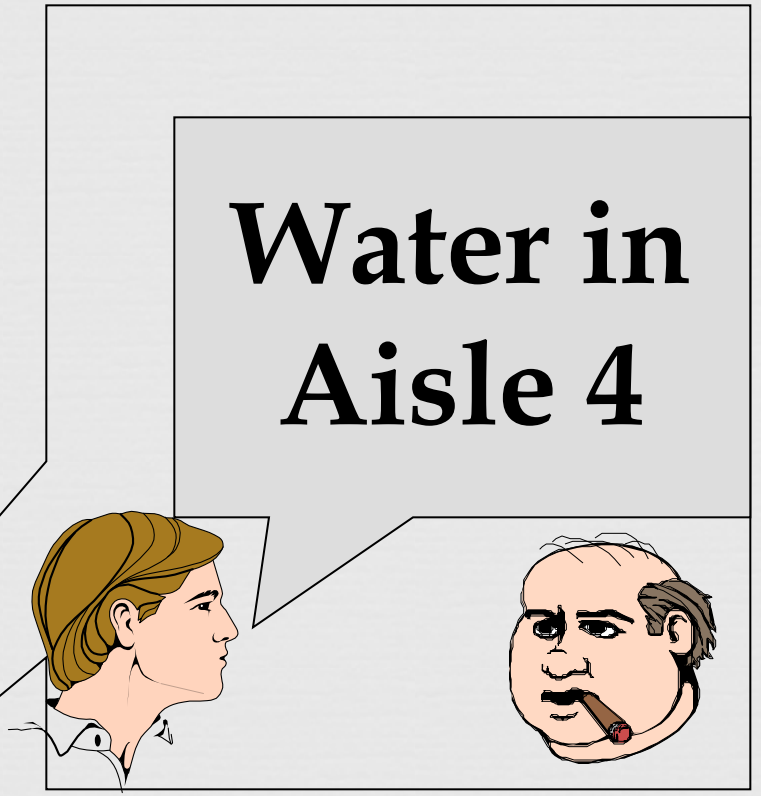
Hearsay—What? Why Do We Care?

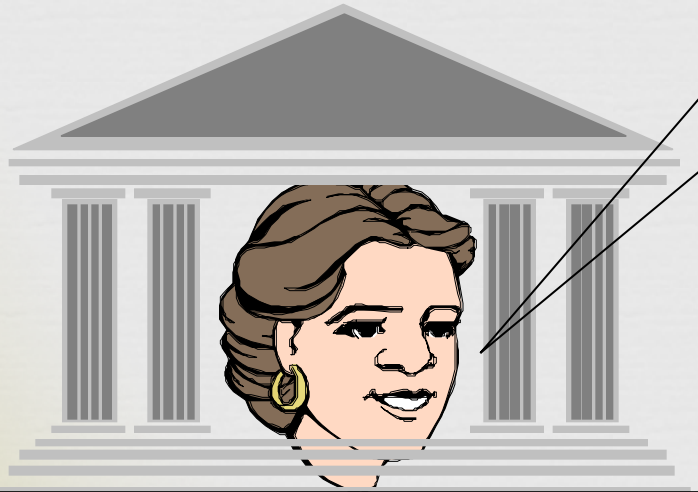
- A "Statement" can be oral, written, or nonverbal conduct, "if the person intended it as an assertion." Fed. R. Evid. 801(a).
  - Pointing, following directions, may be "statements". *See United States v. Caro*, 569 F.2d 411, 416 – 17 (5th Cir. 1978) (co-conspirator's "point" at drug location was hearsay).
  - John opens an umbrella. Mark testifies in court about it in a slip-and-fall case where Sam slipped on pavement. Hearsay?
  - What about "hear-think"?: "I thought to myself, 'That guy is a maniac!'"
    - Wright & Graham think no. See 30B Wright & Graham § 7001 n.3

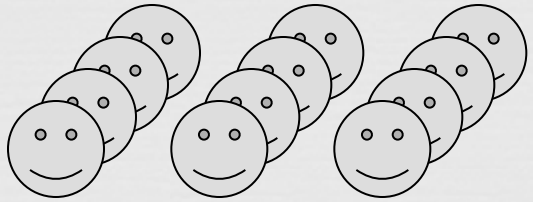
Hearsay—What? Why Do We Care?

- "Hearsay" is a statement offered to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c)(2).
- What is the "truth of the matter asserted"?

Effect on the Listener

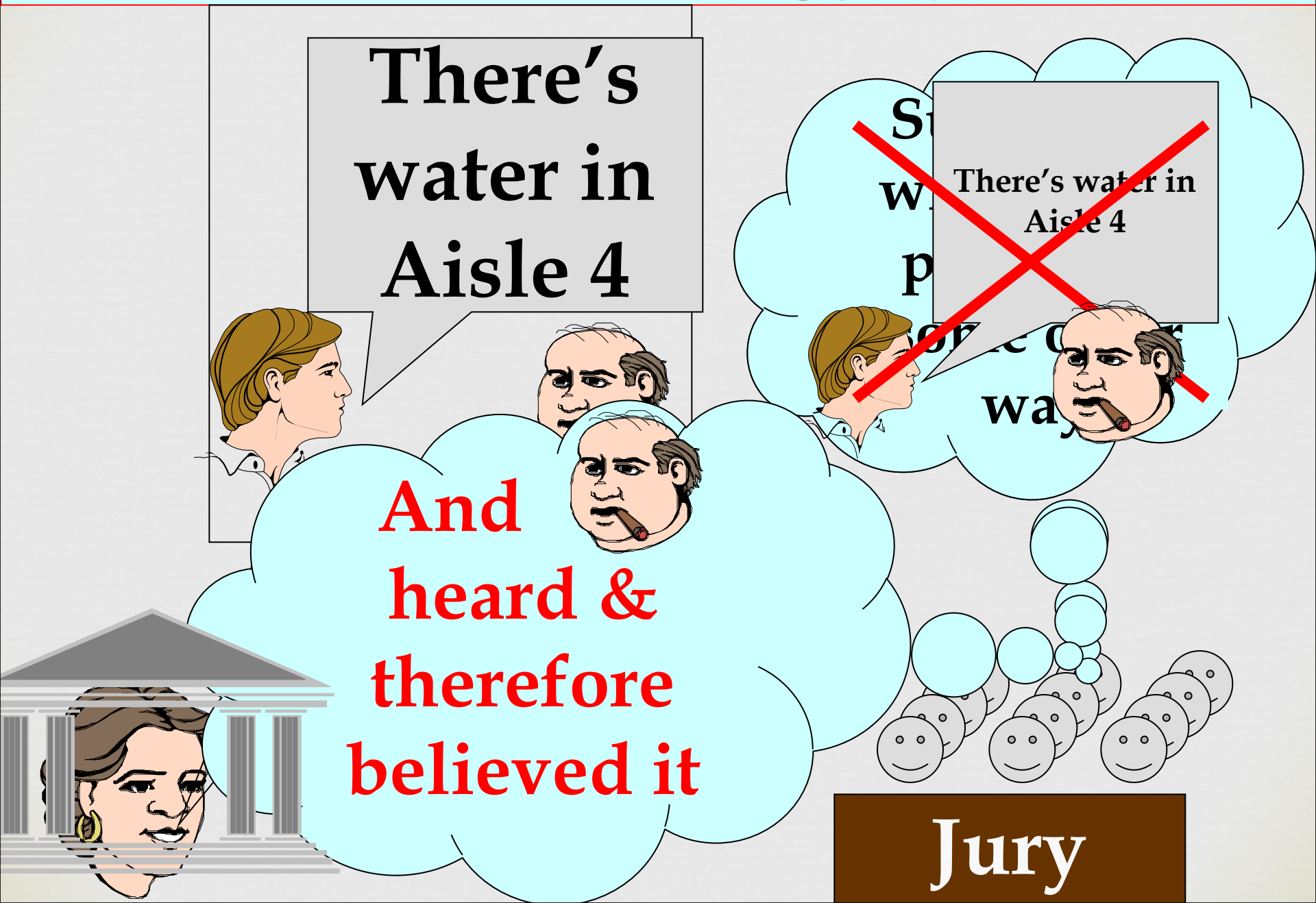






Jury

What's proponent asking jury to think?



Hearsay—What? Why Do We Care?

- "Hearsay" is a statement offered to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c)(2).
- What is the "truth of the matter asserted"?
- **If you ask the jury to believe the truth of the declarant's statement, that's the truth of the matter asserted**

Hearsay—What? Why Do We Care?

- What purposes other than the "truth of the matter asserted"?
  - Verbal acts
    - Offer and acceptance of contracts
    - Acts that constitute a crime
    - Acts offered as evidence of defamation
  - Characterizing Act
    - Parol evidence and the like
  - Characteristics of the declarant (speaks English, understands, was there, etc.)
  - Effect on the listener
  - Impeachment statements

Hearsay—What? Why Do We Care?

- What is the "truth of the matter asserted"?
  - Of course, you have to be careful to ensure that a party is not *really* offering the statement for its truth….
    - *See State v. McNeil*, 2013 UT App 134, ¶ ¶ 47 – 49, 302 P. 3d 844 (hearsay statement offered to show "state of mind" was in reality offered for the truth, where there was no link to subsequent actions and prosecutor mentioned the statements as a fact in closing)
    - *United States v. Becker*, 230 F.3d 1224, 1229 (10th Cir. 2000) (noting that asking the officer the basis for his seeking a search warrant was not merely to "set the scene" for his investigation, and simply saying "on information received" would be sufficient)

Hearsay—What? Why Do We Care?

- Statements that are not hearsay – 801(d)
- These are *exemptions* (or exclusions) from hearsay, rather than exceptions from hearsay.
  - Not found at common law
- So what's the difference?
  - Semantic difference based on the rules.
  - The burden of proving hearsay (and not an exemption) is on the party opposing the admission of evidence; the burden of proving an exception is on the proponent. G. Michael Fenner, *Privileges, Hearsay, and Other Matters*, 30 Creighton L. Rev. 791, 806 – 07 (1997).
  - But courts disagree (or get it wrong) and it doesn't matter "much". *Id.*

Hearsay—What? Why Do We Care?

- Statements that are not hearsay – 801(d)
  - **(1) A Declarant-Witness's Prior Statement**
    - Inconsistent with declarants testimony given under penalty of perjury at a trial, hearing, or other proceeding*; OR
    - Is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence… ;** OR
    - Identifies a person as someone the declarant perceived earlier
  - * "Prior proceeding" does not include statements given to law enforcement.
  - ** Proof that the witness's prior statements are hearsay. Why do we care? Not so much for credibility or cross-examination purposes, but to avoid a parade of witnesses testifying to the continued veracity of a story.
  - **Note: The prior statement, inconsistent or consistent, may be offered for its *truth*, not merely for impeachment purposes.**
  - **Are there strong secondary indicia of truthfulness?**

Hearsay—What? Why Do We Care?

- **A different rule in Utah!**
- **URE 801(d)(1)**
  - **(A) Is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or**
  - **(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying.**
  - **Advisory Committee note:** "It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent, or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury."
  - *See In re Estate of Valcarce*, 2013 UT App 95, ¶ 31 n.12, 301 P.3d 1031, 1040 (recognizing that an affidavit entered at trial can be admitted for its substance, and not merely for impeachment).

Hearsay—What? Why Do We Care?

- Statements that are not hearsay – 801(d)
- **(2) An Opposing Party's Statement (An "admission" by a party opponent)** Offered "against the party" and
  - Made by the party in an individual or representative capacity
  - Is one the party manifested that it adopted or believed to eb true
  - Was made by a person whom the party authorized to make a statement on the subject
  - Was made by the party's agent or employee on a matter within the scope of that relationship and while it was executed
  - Was made by the party's co-conspirator during and in furtherance of the conspiracy.

Hearsay—What? Why Do We Care?

- **801(d)(2) Admissions by a party opponent**
  - Don't have to be "admissions"
  - Don't have to be based on personal knowledge
  - Can be conclusory or without expert foundation
  - Theory goes: You can't complain about not being able to cross-examine yourself.
  - Other theory goes: You're in litigation; we can use your words against you.

Hearsay—What? Why Do We Care?

- **801(d)(2) Admissions by a party opponent**
  - (A) "Representative Capacity" requires no proof that you were acting in that capacity when you made the statement, just that the statement is relevant to the representative affairs

Hearsay—What? Why Do We Care?

- **801(d)(2) Admissions by a party opponent**
- (B) Party "manifested that it adopted or believed to be true." Usually under the totality of the circumstances
  - Admission by silence?
    - Party present, heard, understood, able to respond, and it is reasonable to expect a denial if false.
    - Applies to unresponded-to documents
    - Applies to civil and criminal cases. Should it apply when the accusation is made by law enforcement?
  - Is a telephone bill admissible to prove that you owned that telephone?
    - Yes, where there's "possession plus" (for example possession of the telephone plus possession of the bill for a period of time). *See United States v. Pulido-Jacobo*, 377 F.3d 1124, 1132 (10th Cir. 2004)

Hearsay—What? Why Do We Care?

- **801(d)(2) Admissions by a party opponent**
- (C) Made by an authorized person
  - Authority must be express or implied, but must be established by the proponent at trial
  - Usually reviewed on agency principles
  - Includes statements by the authorized person to the principal himself, such as books or records
    - *See Fischer v. Forestwood Co.*, 525 F.3d 972, 984 – 85 (10th Cir. 2008) (holding that tape recorded statement between business owner and son admissible in a Title VII case, even though it was "between parties" and between a father an son)
  - Can include attorneys, even government attorneys.

Hearsay—What? Why Do We Care?

- **801(d)(2) Admissions by a party opponent**
- (D) Made by the party's agent or employee
  - Employment relationship independent of the statement
  - Statement must be made during the existence of the declarant's "agency or employment"
  - Statement must concern a matter within the scope of the declarant's employment or agency.
    - But statement itself does not have to be authorized

Fischer v. Forestwood Co., 525 F.3d 972, 984 – 85 (10th Cir. 2008)

Hearsay—What? Why Do We Care?

- **801(d)(2) Admissions by a party opponent**
- (E) made by the party's coconspirator during and in furtherance of the conspiracy
  - Must be foundation evidence establishing the conspiracy and the defendant's and declarants participation in it.
  - The statement may be considered in establishing the conspiracy, but is not sufficient by itself. *Bourjaily v. United States*, 483 U.S. 171 (1987); Rule 801(d)(1)(E) says the statement *must* be considered.

Hearsay—The Exceptions

- Rule 803 exceptions do not require the declarant to be unavailable.
  - They are thus "so trustworthy as to be admissible without requiring imposition of the time and expense associated with production of a declarant if available or in spite of the fact that the declarant of the statement actually testifies at trial."
- Rule 804 exceptions require the declarant to be unavailable
  - "…thereby manifesting a recognition that in such instances the live testimony of the declarant is preferrable, but that it is better to permit the evidence pursuant to one of those exceptions than to deprive the factfinder of the evidence altogether."
- Rule 805 notes that there can be "hearsay within hearsay"
- Rule 807 provides a residual exception

Hearsay—The Exceptions

- Rule 803(1) Present Sense Impression
  - A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
  - Theory: You remove the memory and deception problems
    - If a court relies more on the *memory* theory, then the "immediately after" time period increases. If it's more concerned about conscious misrepresentation, then "immediately" means something more immediate.
    - Wright & Graham: "Maybe today 'immediately after' should be measured roughly by the time it takes to locate a cell phone and text a friend or make an entry on facebook."

Hearsay—The Exceptions

- Rule 803(1) Present Sense Impression
  - Two hours, way too long, even if it is a little old lady talking to her husband about being confused when driving. *Scott v. HK Contractors*, 2008 UT App 370, ¶ 8, 196 P.3d 635.
  - But "a few minutes" between the time a mother went looking for her (4-year-old) kids (200 feet away) and found them, and heard the kids say "That man showed us his weenie" was not. *State v. McMillan*, 588 P.2d 162, 163 (Utah 1978).
    - Truthfulness because of the age of the victim? Purposes of the exception?
    - Legal realism?

Hearsay—The Exceptions

- Rule 803(2) Excited Utterance
  - A statement relating to a starting event or condition, made while the declarant was under the stress of excitement that it caused.
  - Theory: Absence of time; "aroused emotional state that is likely to still reflective capacity," i.e., your mind is not right to lie.

Hearsay—The Exceptions

- Rule 803(2) Excited Utterance
  - Subjective test
  - Time: As long as you're still "under the stress of the situation" – determined by the Court.
    - Statement by six-year-old victim of sexual assault who was bleeding, in pain, and "psychic shock" was fine. *State v. Smith*, 909 P.2d 236, 241 (Utah 1995)
    - But six hours is too long, even for a victim of domestic violence. *West Valley City v. Hutto*, 2000 UT App 188 ¶ 19.
  - "Utterances," not "ongoing discourse," even if the declarant is still excited. *Hutto*, 2000 UT App 188 at ¶ 14.

803(1) and 803(2) Compared

Present Sense Impression

- Content: Describing an event or condition
- Time: While or immediately after perceiving it (Short)
- Personal Knowledge: None required (declarant or witness)

Excited Utterance

- Content: Relating to a startling event or condition
- Time: Made while under the stress of excitement (Probably longer, but not on the *retelling* of it)
- Personal Knowledge: Required? (declarant)

Hearsay—The Exceptions

- Rule 803(3) Then-Existing Mental, Emotional, or Physical Condition
  - A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or physical condition (such as mental feeling, pain, or bodily health) but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will

Hearsay—The Exceptions

- Rule 803(3) Then-Existing Mental, Emotional, or Physical Condition
  - John said, "I intend to go to Kansas City."
  - John said, "Oh, yeah, I remember going to Kansas City"

Hearsay—The Exceptions

- Rule 803(4) Statement Made for Medical Diagnosis or Treatment:
  - Made for AND
  - Pertinent to
  - Medical Diagnosis (patient) OR Treatment (Dr.) AND
  - Describes medical history; past or present symptoms or sensations; their inception; or their general cause
  - Statement will be admissible only if it is reasonably pertinent to diagnosis or treatment

Hearsay—The Exceptions

- Rule 803(4) Statement Made for Medical Diagnosis or Treatment:
  - What about statements made to a doc in anticipation of litigation?
    - Doesn't matter. "Rule 803(4) applies to statements made for the sole purpose of diagnosis, which includes statements made to a doctor who is consulted only to testify as an expert witness." Statements to doctor about sexual history, two years after alleged assault, were likely admissible. *United States v. Whitted*, 11 F.3d 782, 787 (8th Cir. 1993) (pre-*Crawford*)
  - What about identity of perpetrators?
    - Usually not admissible, as identities are usually not relevant to statements of diagnosis or treatment.

Patricia sues Dan alleging leg injury only

At Patricia's lawyer's request, I examined her to determine the extent of her injuries:

Hearsay—The Exceptions

- Rule 803(5) Recorded Recollection. A record that:
  - Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately AND
  - Was made or adopted by the witness when the matter was fresh in the witness's memory; AND
  - Accurately reflects the witness's knowledge

  (Can read the evidence into the record, but can't receive the document as an exhibit unless offered by adverse party)

Hearsay—The Exceptions

- Rule 803(6) Records of a Regularly Conducted Activity
  - Record of an act, event, condition, opinion, or diagnosis if:
  - The record was made at or near the time by—or from information transmitted by—someone with knowledge;
  - Record is kept in the course of a regularly conducted activity of a business [or similar organization]…
  - Making the record was a regular practice of that activity;
  - …Shown by records custodian or proper certification; and
  - Neither the source of the information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Hearsay—The Exceptions

- Rule 803(7) Absence of Records of a Regularly Conducted Activity
  - Stuff that's not in a business record, if
  - The evidence is admitted to prove that the matter did not occur or exist;
  - The record was kept for a matter of that kind; and
  - Neither the possible source of the information nor other circumstances indicate a lack of trustworthiness

Hearsay—The Exceptions

- Rule 803(8) Public Records
  - Statement of a "public office" if the record sets out the office's activities, a matter observed while under a legal duty to report, or in a civil case (or in a criminal case offered against the government) factual findings from a legally authorized investigation, all so long as the source and other circumstances indicate a lack of trustworthiness
- Rule 803(9) Vital Statistics
  - Record of birth, death, or marriage, if reported to a public office in accordance with a legal duty
- Rule 803(10) Absence of a public record
  - A diligent search did not disclose a public record, if offered to prove that the record does not exist, OR that the matter did not occur, so long as the office regularly kept a record or statement for a matter of that kind

Hearsay—The Exceptions

- Rule 803(11) Records of Religious Organizations Concerning Personal or Family History
  - Statement of birth, death, relationship, etc. contained in a regularly kept record of a religious organization.
  - Can you believe – not one case from Utah or the 10th Circuit!
- Rule 803(12) Certificates of Marriage, Baptism, and Similar Ceremonies
  - Requires statements are made by person authorized attesting to the ceremony and purportin to have issued it at the time "or within a reasonable time after that"
- Rule 803(13) Family Records
  - Personal or family history contained in a "family record" such as a Bible, genealogy … inscription on a portrait, or engraving on an urn or burial marker.
    - Query: Reliability in a genealogy?

Hearsay—The Exceptions

- Rule 803(14) Records of Documents that Affect an Interest in Property
  - So long as the record is kept in an authorized public office and is admitted to prove the content of the original document.
- Rule 803(15) Statements in Documents that Affect an Interest in Property
  - If the matter was relevant to the document's purpose, unless subsequent dealings are inconsistent….
- Rule 803(16) Statements in Ancient Documents
  - If you can establish authenticity (its condition looks good, it was in the place where it was supposed to be, and has been existence 20 years or more), it's in.
    - Very few cases; kind of surprising
    - "strong evidence" "due to a rule of necessity as well as to the reliability of such evidence in comparison to any other form of evidence," *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (D. Wyo. 1985).
    - Query of the last statement is true.

Hearsay—The Exceptions

- Rule 803(17)Market Reports and Similar Commercial Publications
  - "Generally relied on by the public or by persons in particular occupations"
- Rule 803(18) Statements in Learned Treatises, Periodicals, or Pamphlets
  - Only for cross or direct examination of an expert witness
  - Only if reliability is established by the expert, another expert, or judicial notice
  - Only read, but not received as an exhibit.
  - Query: How does this fit in our purpose rules? Remember, this is offered for the *truth of the matter*, not for impeachment.

Hearsay—The Exceptions

- Rule 803(20) Reputation concerning boundaries or "general history"
  - The reputation must have arisen before the controversy.
  - "Everybody knows that tree was the one Johnny Appleseed planted…."
- Rule 803(21) Reputation Concerning Character
  - Hearsay spin on methods of proving character under 404 or 608

Hearsay—The Exceptions

- Rule 803(22) Judgment of previous conviction
  - Felony
  - Trial or guilty plea, not no contest
  - Fact "essential to the judgment"
  - Against the defendant, in a criminal case (except for purposes of impeachment)
- Rule 803(23) Judgment involving personal, family, or general history or a boundary
  - Must be essential to the judgment AND
  - *Could* be proved by evidence of reputation

Hearsay—The Exceptions

- Rule 804 – Exceptions when the declarant is unavailable
- What is "Unavailable" mean?
  - Privilege
  - Refuses to testify despite court order
  - Can't remember
  - Death, sick, or crazy,
  - Absent (statement's proponent has not been able, and by process or other reasonable means, to procure the declarant's attendance)
  - But if you made him "swim with the fishes," you can't rely on the statements.

Hearsay—The Exceptions

- 804(b)(1) Former Testimony
  - Given as a witness at trial, hearing, or deposition and
  - Offered against a party (or predecessor in interest in a civil case) who had an opportunity and similar motive to develop it by examination
  - *Cf.* Fed. R. Civ. P. 32(a)(4).

Hearsay—The Exceptions

- 804(b)(2) Dying Declaration
  - Statement that declarant, while believing the declarant's death to be imminent, made about its cause or circumstances
    - FRE – Criminal Homicide Case or Civil Case
    - URE – Any civil or criminal case "if the judge finds it was made in good faith"

Hearsay—The Exceptions

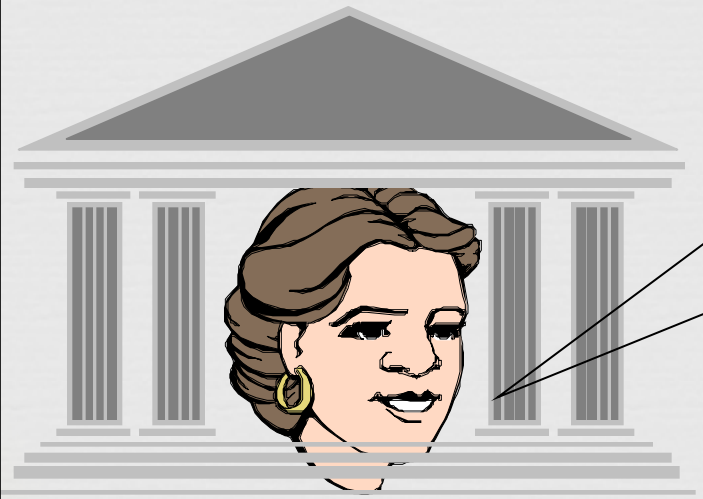
- 804(b)(3) Statement Against Interest
  - A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or has so great a tendency to invalidate the declarant's claim against someone else or expose the declarant to civil or criminal liability; and
  - Is supported by corroborating circumstances, if offered in a criminal case to accuse the declarant

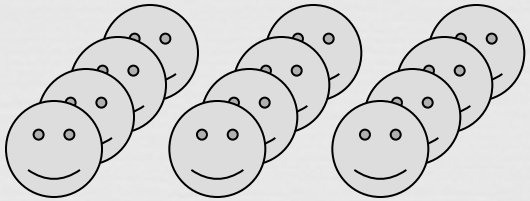
Hearsay—The Exceptions

- 804(b)(4) Statement of Personal or Family History
  - A statement about the declarant's birth, adoption, legitimacy, ancestry, marriage, divorce, family relationship, *even though the declarant had no way of acquiring personal knowledge about that fact* or of another person, if that person was related to the declarant or was so intimately associated with the person's family that the declarant's information is likely to be accurate

804(b)(4)

The only reason to have this rule?





Jury

Hearsay—The Exceptions

- 805 Hearsay within Hearsay
  - Hearsay within hearsay is not excluded if each part of the combined statements conforms with an exception to the rule

Hearsay—The Exceptions

The testimony proposed to be offered by Desiray Coleman and Miguel Perez is repetitive and unreliable. Both witnesses are proposed to state that "they heard Sheryl Scott say that Richard Almeida told her [*i.e.*, Scott]" that Marshal Corsi's mother called to inform the Agency that Marshal was sick." While the subject matter of the proposed testimony is potentially relevant to the issue in this matter, it is repetitive because both Mr. Almeida, Mr. Corsi, and Ms. Scott are all available to testify. There is little need for Ms. Coleman and Mr. Perez to add testimony that could be offered by the other three witnesses who were directly involved in the conversation that is the subject of the offered testimony.

Furthermore, the testimony is "hearsay within hearsay within hearsay," which has questionable reliability. Although hearsay testimony is not prohibited in Step 4 Hearings, it must

Hearsay—The Exceptions

- 807 Residual Exception
  - The statement has equivalent circumstantial guarantees of trustworthiness (as one in 803 or 804)
  - Offered as evidence of a material fact
  - More probative than any other evidence that the proponent can obtain through reasonable efforts
  - Admitting it will best serve the purposes of these rules and the interests of justice
  - And the party gives notice prior to trial

Hearsay & The Sixth Amendment

- U.S. Const. amend. VI:
  - In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him….
  - But the very definition of hearsay is a witness speaking through another witness, without the chance to cross-examine the declarant!
  - But hearsay exceptions had been around during the framing, so certainly the framers did not intend to constitutionally prohibit the admission of hearsay in a criminal case
  - *Ohio v. Roberts*, 448 U.S. 56 (1980). Hearsay OK if:
    - Declarant is unavailable; and
    - Statement is made under circumstances proving sufficient "indicia of reliability," i.e. "firmly rooted" hearsay exceptions
    - 807, new rules, etc., courts would have to make credibility determinations on.

Hearsay & The Sixth Amendment

- But then comes *Crawford v. Washington*, 541 U.S. 36 (2004)
  - Facts:
    - Mr. Crawford stabbed Kenneth Lee; Mr. Crawford claimed self-defense.
    - Mr. Crawford and Mrs. Crawford were both interrogated by the police. Mrs. Crawford said that she didn't see a weapon.
    - Mrs. Crawford couldn't be compelled to testify; officer would testify to her statement.
  - Holding: Hearsay violates the confrontation clause when it is "testimonial," and when the defendant does not have an opportunity to cross-examine.
    - What's "testimonial"? "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id. at 68.*

Hearsay & The Sixth Amendment

- And then comes *Davis v. Washingon*, 547 U.S. 813 (2006)
  - "Nontestimonial statements"– "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.
  - "Testimonial statements" – "when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events." *Id.* at 823.
- And then comes *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. ___ (2011) (5-4, Kennedy, Roberts, Breyer, Alito, dissenting)
  - Analysis of drugs, without the testimony *an* analyst, violated the Confrontation Clause when the report contained a testimonial certification made in order to prove a fact at a criminal trial
  - Analysis of drugs, with out the testimony of *the* analyst, violated the Confrontation Clause

Hearsay & The Sixth Amendment

- And then comes *Michigan v. Bryant*, 562 U.S. ___ (2011)
  - Police were dispatched to a gas station parking lot and found the victim wounded. He said he'd been shot outside Bryant's house, and he'd driven himself to the gas station. Five officers used successive examinations to question the victim about what had happened
  - The "primary purpose" of the statement is crucial; objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties. Considering both the declarant and the interrogator.
  - Though he was removed from the scene, the assailant was armed with a gun, and the victim was seriously wounded, increasing the scope of the emergency.

Hearsay & The Sixth Amendment

- Justice Scalia dissents:
  - Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), I dissent.

Hearsay & The Sixth Amendment

- Where does *Crawford* apply?
  - Criminal cases? Yes.
  - Juvenile cases? Probably. *See In re N.D.C.*, 229 S.W.3d 602, 605 (Mo. 2007); *In re Gault*,387 U.S. 1 (1967) (confrontation right exists in juvenile proceedings).
  - Other types of civil cases? Probably not. *See Ferrell v. Alexandria Dep't of Cmnty. & Hum. Servs.*, No 1705-11-4, 2012 WL 443523, at * 3 (Va. Ct. App. Feb. 14, 2012) (non-testifying child's testimony admissible in parental termination case)
  - In the case of a *Defendant's confession?* Interesting academic question. *See* Mark A. Summers, *Taking Confrontation Seriously*, 76 Alb. L. Rev. 1805 (2012 – 2013) (arguing that a confession is "testimonial hearsay" but that there may be a "historical exception" to the *Crawford* rule).

Quiz Time!

Q: A man is on trial for mail fraud involving a scheme in which he allegedly, as bank manager, had commissions from third-party broker-dealers, through which the bank offered financial products to the public, paid directly to himself, rather than to the bank. The bank's president is the defendant's father. The court is deciding whether to allow witness testimony about the father's demeanor that the father was "angry and in shock," when hearing news about his son. Should the court allow the witness testimony?

A. Yes, because it is a nonverbal emotional reaction offered to prove the truth of the matter asserted.
B. Yes, because it is a nonverbal emotional reaction intended as an assertion.
C. No, because a nonverbal emotional reaction does not qualify as an assertion.
D. No, because it is hearsay not within any exception.

"The Rules of Evidence and our case law make clear that testimony concerning a person's nonverbal emotional reaction does not qualify as an assertion." *United States v. Campbell,* 507 F. App'x 150, 154 (3d Cir. 2012).

Q: A convicted felon is on trial for alleged domestic violence against his girlfriend. When police arrived on the scene at the time of the incident, they spoke with the girlfriend in the front yard and she then led them to the couple's bedroom to show the police a gun. The girlfriend wants to testify that the boyfriend had threatened to kill her if she reported the domestic violence to the police. Is this testimony admissible?

A. Yes, because it is being offered for a reason other than to prove the truth of the matter asserted.
B. Yes, if the domestic violence charge carries a sentence at least one year in jail.
C. No, because the statements are testimonial and their introduction would violate the Confrontation Clause.
D. No, because it is hearsay not within any exception.

United States v. Ledford, 443 F.3d 702, 708 (10th Cir. 2005) (Mr. Ledford's statement does not appear to have been offered for the truth of the matter asserted, that he would indeed kill Ms. Carey if she went to the police. Instead, it seems to have been offered only to prove that Mr. Ledford made the threat).

Q: Ms. Highbar lost her job for a City when her position was eliminated for budgetary reasons. A year after her termination, the City created a new position. Ms. Highbar and another woman applied for the position, but a man with no previous experience was selected. Ms. Highbar sued for gender discrimination, and the City claimed that she was not selected because she expressed that she was not interested in working part-time and that she had misconduct issues. Ms. Highbar wants to introduce evidence that the Mayor personally notified Ms. Highbar about a position in another department, which would show that she was an upstanding worker and qualified to work for the City. Should the court admit the letter?

A. Yes, because it is hearsay within the business record exception.
B. Yes, because it is not hearsay due to the admission of a party-opponent exemption.
C. Yes, provided pretrial notice was given, because it is has other indicia of reliability.
D. No, because it is hearsay not within any exception.

Lowber v. City of New Cordell Okla., 378 F. App'x. 836 (10th Cir. 2010).

Q: Potato Company brought suit against a potato Distributer (that had acquired the distributer the Company had contracted with) for failure to pay the Company after the potatoes had been distributed. The Company seeks to introduce an exhibit containing an e-mail response from a Distributer employee to a Company employee about his pending termination from Distributor. The e-mail was sent eleven days after the Distributor employee had notice of his termination. Should the Court admit the exhibit?

A. Yes, because the e-mail is hearsay that falls under the present sense impression exception.
B. Yes, because it is not hearsay due to the admission of a party-opponent exemption.
C. No, because the e-mail is hearsay that does not meet the requirements of the present sense impression exception.
D. No, because e-mails have no indicia of truthfulness.

Skyline Potato Co., Inc. v. Hi-Land Potato Co., Inc., 2013 WL 311846

Q: An inmate is assaulted by fellow inmates, suffering brutal injuries. The victim is kept in a cell near his attackers while awaiting transport to the hospital, and they allegedly threatened him if he sought help from the guards. An hour after the assault, and twenty to thirty minutes after his removal from the presence of his assailants, while nervous and fidgety, the victim reports the statements to the guards. Defendants move to exclude these statements. Should the court admit the statements?

A. Yes, it is hearsay falling under an excited utterance exception.
B. Yes, it is hearsay falling under the present sense impression exception.
C. No, because the statements do not describe an event made immediately after the inmate perceived it.
D. No, it is hearsay not within an exception.

U.S. v. Pursley, 577 F.3d 1204 (concluding that the inmate was still "languishing under the event's agitation" (he seemed excited, appeared nervous, and was fidgety) and, therefore, his statements fell under the excited utterance exception).

Q: A man is on trial for allegedly sexually abusing his minor-niece. The niece made statements to a physician's assistant that the defendant had "touched her private parts" and motioned to her vaginal area. The United States moves to introduce the statements. The man seeks to keep the medical examiner's testimony about the niece's statements out of court, arguing that the content of the testimony does not fall under a hearsay exception. Should the court grant the United States' motion?

A. Yes, because it is hearsay and relevant to seeking a medical diagnosis or treatment, and the perpetrator had an intimate relationship with the victim.
B. No, because it is hearsay and the relevant exception does not apply to information regarding abuse of minors.
C. No, because it is testimonial hearsay and would violate the Confrontation Clause.
D. No, it is hearsay not within an exception.

U.S. v. Wilson, No. CR 09-1465-JB, 2010 WL 3023035 (D.N.M. June 23, 2010) (noting that identification is admissible under 803(4) where the identification of the assailant is "reasonably pertinent," which it is in "virtually every domestic sexual assault case")

Q: An inmate files suit against a prison official for alleged violation of his civil rights. The prison official argues that the inmate failed to exhaust his administrative remedies. The inmate objects to the declaration of a legal advisor to the county sheriff, in which the legal advisor provides a copy of the prison's grievance procedures and copy of the inmate's grievance file lacking evidence of an appeal. Should the court admit the declaration and evidence?

A. Yes, because the documents are public records.
B. Yes, the court should admit the declaration, the inmate's grievance file, and the procedure guidelines, so long as no circumstances exist showing a lack of trustworthiness.
C. The court should admit the prison grievance procedure guidelines but not the declaration.
D. No, they are hearsay statements not within an exception.

Brooks v. Johnson, No. 07-cv-00417-ewn-mjw, 2008 WL 906839 (D. Colo. March 31, 2008.)

Evidence—Proving One's Case

Thank you!